**STATE OF MICHIGAN**
**IN THE SUPREME COURT**

**Appeal from the Michigan Court of Appeals**
**Saad, P.J., and Jansen and Donofrio, J.J.**

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

TERRY NUNLEY,
Defendant-Appellee,

Docket No. 144036

and

ATTORNEY GENERAL
Intervenor.

# REPLY BRIEF – APPELLANT
**Oral Argument Requested**

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*Statement of Jurisdiction*

On December 21, 2011, this Court granted the People's application for leave to appeal the October 13, 2011 judgment of the Court of Appeals. MCR 7.301(A)(2). The People filed the Plaintiff-Appellant's Brief on February 13, 2012. The Attorney General filed an Intervener's Brief on February 15, 2012. Defendant-Appellee filed a Brief on March 19, 2012.

## *Statement of Question Presented*

I. The Department of State prepared an Order of Action regarding Defendant's license revocation, mailed it to him via first-class United States mail, and certified the mailing of that Order and many like it. Months later, Defendant drove. The Department's record bears no relationship to historical *ex parte* examinations. Is the certificate of mailing non-testimonial, and is its admission at trial without witness testimony consistent with Confrontation Clause jurisprudence?

Plaintiff-Appellant answers, "Yes."
Intervener Attorney General answers, "Yes."
Defendant-Appellee answers, "No."
The trial court answered, "No."
The circuit court answered, "No."
The Court of Appeals answered, "No."

## *Statement of Facts*

Plaintiff-Appellant refers the Court and parties to the Statement of Facts in its original Brief.

*Argument*

**I. The Department of State prepared an Order of Action regarding Defendant's license revocation, mailed it to him via first-class United States mail, and certified the mailing of that Order and many like it. Months later, Defendant drove. The Department's record bears no relationship to historical *ex parte* examinations, is non-testimonial, and its admission at trial without witness testimony is consistent with Confrontation Clause jurisprudence.**

Standard of Review

Whether the certificate of mailing, along with the Order of Action, is testimonial such that its admission implicates Defendant's Sixth Amendment right of confrontation is a question of law that this Court reviews de novo.[1]

Analysis

As a qualifier, the People urge upon this Court a reminder that the selected subjects of this Brief, written in reply to certain positions in Defendant's brief, in no way suggest agreement with those of his positions to which this Brief is not directed. Nevertheless, the People wish to select two positions – one general and one technical – advanced in Defendant's brief for specific reply.

Regarding the general, or overarching, position: On page 17 of his Brief, Defendant cited a passage from *Bullcoming v New Mexico*: "Nor is it 'the role of courts to extrapolate from the words of the [Confrontation Clause] to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values.'"[2] That passage cited to

[1] *People v Fackelman*, 489 Mich 515, 524; 802 NW2d 552 (2011).
[2] *Bullcoming v New Mexico*, 564 US ___; 131 S Ct 2705, 2716; 180 L Ed 2d 610 (2011).

the plurality opinion of *Giles v California*,[3] and was immediately followed by "[a]ccordingly, the Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination."[4]

As repeatedly urged in the original Brief, the People again submit that context matters.[5] The People readily concede that if this Court finds that the certificate of mailing is testimonial, then any confrontation-by-proxy similar to that unsuccessfully attempted by the State of New Mexico would be likewise impermissible here. But that concession does not mean that this Court can simply shrug its shoulders and declare every challenged item of hearsay testimonial under the guise of declining to "extrapolate."

We know that the "Constitution's text does not alone resolve this case."[6] So regardless whether "extrapolation" is forbidden, this Court must do something with the Constitutional text. What this Court must do is apply the meaning of the Confrontation Clause to the certificate of mailing. And the meaning of the Confrontation Clause must relate to "the principal evil at which the Confrontation Clause was directed," the use of *ex parte* examinations as evidence against an accused.[7]

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[3] *Giles v California*, 554 US 353, 375; 128 S Ct 2678; 171 L Ed 2d 488 (2008).
[4] *Bullcoming*, 131 S Ct at 2716.
[5] See Plaintiff-Appellant's Brief on Appeal, p 11.
[6] *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).
[7] *Crawford*, 541 US at 50.

More specifically, we know that there is a Constitutionally relevant distinction between testimonial hearsay and non-testimonial hearsay. Finding that line of distinction requires that this Court consider, if not the "values" of the Confrontation Clause, then at the very least the principal evil at which it was directed. It requires that this Court consider the factual context of the certificate of mailing as it relates to that principal evil. The People submit that such consideration must acknowledge the (lack of) relationship between the parameters of the public record exception to the hearsay rule and the parameters of *ex parte* examinations.

Indeed, the Unites States Supreme Court did something similar in the case of *Giles v California*, cited (indirectly) by Defendant. In the context of the relationship between the Constitutional forfeiture-by-wrongdoing doctrine and FRE 804(b)(6), "[i]t seem(ed) apparent (to that Court) that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots."[8]

The roots of the Confrontation Clause and the roots of the public records exception to the hearsay rule likewise share similarity. Those roots took hold in this case before there was even a case; before Defendant even committed his crime. At its root, the certificate of mailing is a public record, not an *ex parte* examination. Its admission absent confrontation does not offend the Sixth Amendment's Confrontation Clause.

[8] *Giles*, 554 US at 365.

Moving from the general to the technical, on page 20 of his Brief Defendant asserted that the People "argue...that the certificate of mailing is a public record that is maintained by the Secretary of State pursuant 'to duty imposed by law.'" Defendant cited to page 13 of the original Appellant's Brief, and went on to suggest that the People cited no authority in support of that argument.

Here is what the People said at page 13 of the original Appellant's Brief: "By the plain terms of MRE 803(8), the Department's Order was a public record in June 2009. That is, it was a record of a public office or agency setting forth its activities or matters observed pursuant to duty imposed by law...." Page 15 of the Appellant's Brief then argued that "[t]he same conclusion holds for the Department's certification that the Order had been sent...."

By way of reply to Defendant's Brief, the People argue, again, that the plain terms of MRE 803(8) provide authoritative support for the position advanced. Here is what MRE 803(8) says:

> Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624.

MRE 803(8) explicitly sets out two classes of records, and does so in the disjunctive. So, to the extent that MRE 803(8) is an authority, there are two

ways it comes into play. The People's Brief noted this precise disjunctive on page 13: "setting forth its activities or matters observed pursuant to duty imposed by law."

Addressing the first alternative for qualification, at 803(8)(A), the Department's certificate of mailing is a record or a data compilation setting forth the activities of the Department, and more specifically the activity of mailing an Order of Action (actually, several of them) to various suspended licensees including Defendant. Mundane as it sounds, public offices do a lot of things, and rightly need to keep track of what things they did and when they did them. Not keeping track of those things would lead to any number of deficiencies and inefficiencies that need not be detailed.

Because MRE 803(8) is in the disjunctive, no further analysis is necessary. Nevertheless, the Department's certificate of mailing is also, under MRE 803(8)(B), a record or data compilation setting forth matters observed pursuant to duty imposed by law as to which matters there was a duty to report. If, but only if, this Court reaches this analysis, it should find that Defendant's attempt on page 21 of his Brief to dissociate from MCL 257.204a(1)(h) is misplaced.

MCL 257.204a(1) requires that the Secretary of State create and maintain a computerized central file that provides an individual historical driving record for a person. Subsection (h) requires that a driving record include "[a]ny notice given by the secretary of state and the information provided in

that notice under section 317(3) or (4)." Defendant latches onto the fact that MCL 257.317 is addressed to non-residents of Michigan. But that does not mean that MCL 257.204a(1)(h) only applies to non-residents. Instead, that subsection requires that the Secretary of State create and maintain a record that includes any notice given, and if the person is a non-resident, the information provided to the state where the person is licensed. And, last but not least, MCL 257.204a(1)(b) requires that a driving record include "...other licensing action that is entered against the person...." Since the Order of Action is meaningless without being actually mailed, the mailing and its confirmation are part of the licensing action.

Reiterating, at its root the certificate of mailing is for multiple reasons a public record. It is neither an *ex parte* examination nor similar to one. Its admission absent confrontation does not offend the Sixth Amendment's Confrontation Clause.

*Relief Requested*

The People of the State of Michigan respectfully request that this Court reverse the Court of Appeals, hold that the Department of State certificate of mailing is non-testimonial, and remand this case to the district court for trial consistent with that holding.

Respectfully submitted,

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